IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 509 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BECHAR VALA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 509 of 2001

MR MUKTESH V PATEL for Petitioner No. 1-5

MR ANIL N MEHTA for Petitioner No. 1

Mr L R Pujari, APP for Respondent No. 1

MR YH VYAS for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 27/12/2002

ORAL JUDGEMENT

This is an application under section 482 of the Code of Criminal Procedure, 1973 (for short, 'the Code') for obtaining following reliefs:

"B. To stay the proceedings of the FIR II No.144/2000 dated 31.12.2000 complaint filed at Bazana police station till the disposal of this application.

C. To quash and set aside the complaint FIR II No.144/2000 dated 31.12.2000 offence u/s 188 of IPC against the accused.

D. To declare the complaint FIR II No.144/2000 dated 31.12.2000 is unjust, improper and illegal as the said land of society is in possession of the Chairman.

E. To order to restore the land of the said society to the chairman petition.

F. To order to pay cost and compensation to the petitioner-society for the misdeeds of the liquidator.

G. To pass an order against the liquidator for abuse of the process of law.

H. Any relief deemed fit in the circumstances may be kindly granted."

2. The aforesaid FIR being CR. No.II - 144/2000 has been registered before the concerned police station for offence an punishable under section 188 of IPC alleging that the informant was appointed as a watchman in respect of the disputed property by the Liquidator and that the petitioners herein have violated the proclamation issued in this behalf and they committed trespass in respect of the land in question and also collected the cotton sown and grown and thereby committed offence punishable under section 188 of IPC. The offence is said to have taken place at 8 0'clock on 31.12.2000 and the FIR was filed at 12.15 p.m. on the same day. The informant is the watchman appointed as aforesaid. The petitioners are shown as accused persons in the said FIR, they have come out with this application stating that the offence punishable under section 188 of IPC is such that the Court cannot take cognizance in respect of such an offence unless a complaint has been filed before the court by the persons stated in Section 195 of the Code. It is contended by the learned Advocate for the petitioners herein that the informant is not a public

servant and the court would not be in a position to take cognizance of the offence punishable under section 188 of IPC, even if the investigation is concluded and charge sheet is filed. That therefore, the said FIR is required to be quashed. Another contention raised by the learned Advocate for the petitioners is that the said land has been allotted to a Cooperative Society namely; Ambedkar Samuday Kheti Sahkari Mandli Ltd., Taluka Dashada, Dist. Surendranagar. That therefore, the petitioners have a right to cultivate the said land and, therefore, no offence can be said to have been committed by them. Therefore, even on this account the said FIR is sought to be quashed and set aside.

3. Rule was issued and learned APP, Mr L R Pujari appears for the State whereas the contesting respondent is being represented by Learned Advocate Mr Y H Vyas. I have heard learned Advocate for the petitioner Mr M V Patel, Mr Y H Vyas, learned Advocate for the contesting respondent and Mr L R Pujari, learned APP for the State. Mr M V Patel, learned Advocate for the petitioner has argued at great length stating that the court cannot take cognizance in respect of the offence punishable under section 188 of IPC in view of the provisions of section 195 of the Code. In fact the said provision is not in dispute. However, with a view to complete the judgment, it would be appropriate to refer to the provisions made in section 195 of the said Code as follows:

"195.(1) No Court shall take cognizance -
(a) (i) of any offence punishable under sections 172 to 188 (both inclusive) of the IPC, or
(ii) of any abetment of or attempt to commit, such offence, or
(iii) of any criminal conspiracy to commit such offence,
except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate."

The above provision makes it clear that when an offence is said to have been committed by the accused person or when it is alleged that the accused person has committed an offence under section 188 of IPC, then in that event, the Court can take cognizance only on the basis of a complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate. Here, the watchman has filed FIR and at the conclusion of the investigation, the

police investigating officer may require to submit charge sheet under section 173 of the Code. A question, therefore, has arisen as to whether a Court would be in a position to take cognizance of an offence punishable under section 188 of the Code.

4. On a bare reading of clause (a) to sub-section (i) of section 195 of the Code makes it clear that the court will not be in a position to take cognizance of an offence punishable under section 188 of IPC on the strength of a charge sheet. At this stage, learned APP has argued that on the basis of the material produced with the charge sheet, if the court finds that the offence under section 188 of IPC is made out, then it would be open to the Court to take cognizance of an offence under section 188 of IPC on the basis of the charge sheet submitted before it. It is not possible to agree with the said argument advanced by Mr LR Pujari, learned APP. A simple reason is that there is a bar against taking of cognizance in respect of offence punishable under section 188 of IPC on the strength of charge sheet. Therefore, it is not possible for me to agree with the argument advanced by Mr Pujari, learned APP that the court can take cognizance on the basis of charge sheet in respect of the offence punishable under section 188 of IPC. In fact even learned advocate appearing for the contesting respondent also agrees that the court cannot take cognizance in respect of an offence punishable under section 188 of IPC on the strength of a charge sheet. Therefore, I am of the opinion that the court would not be in a position to take cognizance of an offence under section 188 of IPC on the basis of a charge sheet which may be submitted to the Court by the Investigating Police Officer on conclusion of the investigation.

5. However, it is also required to be considered that the offence which are shown to be cognizable are enumerated in the table in the form of First Schedule to the Code. There we find that the offence punishable under section 188 is shown as cognizable offence. This would mean that this offence under section 188 of IPC is cognizable. Once it is held that an offence is cognizable offence, it would be open to the police investigating officer or an officer in-charge of a police station to start investigation and to conclude the same. A Magistrate may not be in a position to take cognizance of an offence but that would not take away the said power, function and duty of a police station officer to investigate a cognizable offence. In the present case, the offence punishable under section 188 of IPC is a

cognizable offence and, therefore, the Investigating Officer would naturally be bound to carry on the investigation in accordance with law.

6. On this aspect of the case, there is a recent decision of the Hon'ble Supreme Court in the case of Manohar M Galani v. Ashok N Advani & Anr. reported in (1999) 8 SCC 737. There the High Court had directed the DGP of Gujarat State to conduct inquiry. The accused persons then filed writ petition before the High Court for quashing the complaint of appellant. There the Hon'ble Supreme Court found that the High Court exceeded its extra ordinary jurisdiction under Article 226 of the Constitution when it quashed public interest petition on the finding that the bar under section 195 of the Code was attracted to the case. The Supreme Court further observed that the High Court's finding was premature and it erred in quashing complaint and inquiry initiated on basis of FIR. The pertinent observations can be found from paras 3 and 4 of the said decision which are reproduced for ready reference as follows:

"3. Mr Gopal Subramanium, learned Senior Counsel appearing for the complainant submitted that the High Court, obviously exceeded its jurisdiction in quashing the FIRs as well as the pending public interest petition whereunder certain inquiries were directed by the High Court itself, on a finding that section 195 will get attracted. According to Mr Subramanium, gross irregularities having alleged to have been committed by the accused persons and the complainant having been harassed unduly by the accused persons, the High Court could not have throttled the investigation and quashed the proceedings on a finding that section 195 would be a bar to proceed further. According to Mr Gopal Subramanium, the bar under section 195 of the Code of Criminal Procedure can be gone into at the stage when the court takes cognizance of the offence and an investigation on the basis of the information received could not have been quashed and an investigating agency cannot be throttled at this stage from proceeding with the investigation particularly when the charges are serious and grave. Learned Counsel for the respondents on the other hand contended that the various subject-matters of the complaints are already being inquired into and, therefore, allowing any further inquiry or complaint if allowed to be proceeded with, it will be an abuse of the process of the court.

Ld. counsel for the respondents, however, fairly conceded that the court was not justified in quashing the public interest petition which has been registered as Criminal Misc.Application No.5722 of 1994 in CR No.211 of 1994."

"4. So far as the public interest petition is concerned, not only the counsel for both the sides agreed that the same ought not to have been set aside but we also fail to understand how the High Court in exercise of its power under extraordinary jurisdiction can interfere with a collateral proceeding initiated by the High Court itself in an application filed in public interest. There cannot be any dispute that the facts revealed a serious scandal in the functioning of some subordinate court in the State of Gujarat and, therefore, the High Court took cognizance of the matter and directed inquiry to be conducted, and on the basis of the said inquiry, it was open for the high Court to issue necessary directions and at that stage the impugned order has emanated. In our considered opinion, the order in the impugned judgment setting aside the aforesaid public interest petition is erroneous and we, therefore, set aside the said order and direct that the public interest petition should be considered by the High Court on merits on the basis of the reports submitted to the court and appropriate directions be given, whatever the Court thinks fit."

In view of the above decision, it is very clear that even when a court is not in a position to take cognizance in respect of an offence in view of bar of section 195 of the Code, the investigating police officer cannot have any hurdle in prosecuting his investigation. Therefore, the FIR filed by the contesting respondent herein cannot be quashed on the ground that the offence is said to have been committed in such that the court will not be in a position to take cognizance.

7. Another decision referred to by the learned Advocate for the contesting respondent is in the case of State of Punjab v. Raj Singh & Anr, reported in (1998) 2 SCC 391. There also it has been observed that power of police to investigate into a cognizable offence is not controlled by section 195 of the Code.

8. On a combined reading of these two decisions, it is clear that even if when the Court is not in a position

to take cognizance of offence, the Police Investigating Officer can still investigate into the case and submit appropriate report before the Court concerned. Therefore, this would not be a ground for quashing the FIR in question.

9. Even apart from the aforesaid contentions, it is well known that even when an informant makes allegations with respect to a particular offence which may be cognizable by police, and during the course of investigation, the I.O. may find that some offence other than the offence alleged has been committed, then in that case, the Investigating Police Officer would not be debarred from filing charge sheet in respect of the offence made out during the course of investigation. In the present case also, it would be open to the Police Investigating Officer to find out as to whether any cognizable offence has been committed by the present petitioners. If, at the end of the investigation, it is found that a particular cognizable offence has been committed by the petitioners or any of them, then it would be open to the Investigating Police Officer to submit appropriate report before the trial court under section 173 of the said Code. Once such a report is submitted, then it would be for the court to decide as to what action can be taken in the matter. Therefore, the FIR cannot be quashed on this ground.

10. Another ground taken is that the petitioner Cooperative Society is the owner and occupant of the land in question and, therefore, no investigation can be undertaken in respect of the said land at the instance of the contesting respondent. In the present case, we find that the Hon'ble Supreme Court was required to deal with this subject in a judgment which has been made available and relevant observation is at page no.65. They are as follows:-

> "Further the reason given by the High Court for setting aside the status quo order is, on the face of it, unjustifiable. The Court held that if Liquidator is allowed to take charge of agricultural land, its yield is bound - to suffer because he will not be in a position to till the land with the same zeal as that of the members of the Cooperative Society who have been cultivating the land since last 25 years. This reasoning is based on the consumption that the Liquidator who is an official of the Government will not be in a position to manage the affairs of the Cooperative

Society including getting the land cultivated appointment of Liquidator or receiver, as the case may be, is method for protecting the property in dispute cultivation of land with zeal does not center a right to continue cultivation of the land in violation of the law. Allegation against the Society was that it was termed by one family and 23 members of the said society belonged to the same family. Because of the said fraud being noticed, the District Registrar exercised his powers. The Gujarat Cooperative Societies Act empowers the District Registrar to pass such appropriate orders. Further if reasoning of the High Court is accepted, in no set of circumstances. Liquidator could be appointed for the Cooperative Societies or for Companies registered under the Companies Act under different enactments. Appointment of Liquidator is accepted form of winding up of a society or a Company. Further, in case where Liquidator is appointed of a Society or a company having agricultural land, he is not required to cultivate the same personally and he can certainly take steps for its cultivation either by giving license or by agency agreement. Therefore, there is no question of agricultural yield suffering because of appointment of a Liquidator. Similarly, in appropriate cases, Court may appoint a receiver to protect and preserve the property. In some cases, the receiver may permit the person who is holding the property to act as an agent of the receiver with a direction to deposit the royalty amount fixed by the receiver or on such other conditions which may meet the interests of justice. This may prevent further injury to the rights of the parties and protect the property. If the allegation against the respondent that Society was established by committing fraud is found to be true then such person should not be permitted to take undue advantage of his fraud.

In the present case, at present the dispute is pending with the District Registrar. Interim order passed by the District Registrar is in force. Liquidator has taken possession of the land. Therefore, till the disposal of the matter by the District Registrar, it is directed that Liquidator would continue in possession of the property. To avoid any dispute and also to see that the agricultural yield does not suffer, the

> Liquidator would grant licence to cultivate the land on the terms and conditions which may be fixed by him or on the basis of agency agreement by recovering a stipulated amount to the society or its members. In any cases, sale of the agricultural produce from the land in question should be done under his supervision and control."

Learned Advocate for the petitioner argues that the concerned party had no right to file a writ petition and, therefore, the writ petition, the subsequent order in the writ petition and even the orders of the Supreme Court are basically illegal and cannot be taken into account. It is not possible to accept the said argument in view of the fact that there is a constitutional provision under Article 141 which clearly shows that the judgments of the Supreme Court are the laws of the land and, therefore, they are required to be accepted as law of the land. If the petitioners felt that some illegalities have been committed, then it was open to the petitioners to move the Supreme Court by way of Review Petition or some other legal proceedings. That has not been done. Therefore, and even otherwise, it would not now be open to this Court to bypass the judgment of the Supreme Court wherein the petitioners were parties.

11. Even otherwise, it is a question of fact as to whether the petitioners were in possession in respect of the land in question, whether the cotton was sown by the petitioners and whether the cultivation was undertaken by them. In view of the above, the police investigating officer will naturally investigate the case from all angles and this would also be a subject matter of investigation by the said officer. It is hoped that while dealing with the investigation and while concluding the investigation, the police investigating officer shall take into account the said fact. When there is a disputed question of fact about the possession of the land, it would not be open to this court to lightly brush aside and set aside the FIR. It would be open for the petitioners to submit appropriate documents which are produced by him before this court to show their possession and ownership in respect of the land in question. If such documents are not produced, the I.O. will naturally consider the same. by collecting evidence from the revenue records to complete the investigation and to give justice to the investigation also. Any way, it would not be open to this court to enter into the disputed question of fact about the possession. In other words, it would not be possible to hold that the

petitioners were in possession right from the beginning and no offence was committed by them. In view of the above position, when the offence is found to be a cognizable one, it would be necessary now for the Investigating Officer to investigate the offence and the investigation cannot be stopped on the ground of bar under section 195 of the Code. Consequently the question of possession is a question of fact which can be investigated by the Police Investigating Officer and, therefore, the investigation cannot be stopped or quashed on the ground of such a dispute question of fact. In view of the above, no case is made out for quashing the complaint and consequently, this petition is without any merit and deserves to be dismissed. When the petition is being dismissed on the aforesaid ground, it seems there is no question of granting compensation or any other relief prayed in this petition.

For the foregoing reasons, this petition is dismissed. Rule is discharged. Interim Relief stands vacated.

Date:27.12.2002 [D P Buch, J.]
msp